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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 406

ELIE J. BOUDOIN
Petitioner

versus

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

NO. 406

ELIE J. BOUDOIN,
Petitioner

versus

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

RESPONDENT'S BRIEF ON THE MERITS

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This case concerns the effort to recover damages from the employer for an assault committed by one unlicensed seaman on another. It arises out of a purely personal, private encounter, having no connection whatever with the ship's

business, occurring in the crew's quarters of the vessel at 2 o'clock of the morning after a holiday.[1] Liability was sought to be predicated upon two theories: (a) the allegedly unseaworthy condition of the ship under the doctrine of *Keen v. Overseas Tankship Corporation*, on the hypothesis that the offending seaman was not "equal in disposition and seamanship to the ordinary men in the calling"; (b) the alleged negligence of respondent in that the assailant, with other members of the crew, had been drinking aboard the vessel shortly prior to the incident, and that the officers of the ship should have discovered the drinking and then suppressed it.

The two men involved were both unlicensed members of the crew.[2] Neither had any supervisory control whatsoever over the other; in fact, they were each in different departments of the vessel.[3] The incident was wholly unconnected with the business of the vessel and was in every sense purely personal and private.

The case arose under the following circumstances:

On Thanksgiving Day, 1949, the SS MASON LYKES, owned by respondent, was docked in Walvis Bay, Africa.[4] Petitioner, Boudoin, who had been off duty for the holiday and who had been ashore drinking, returned to the ship at about 5 p.m., and went to his room and to bed.[5] He brought with him from shore several bottles of liquor which he hid

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[1]R. 270.
[2]R. 269-270.
[3]Ibid.
[4]R. 78
[5]R. 94.

under his bunk.[6] At about midnight, three other unlicensed members of the crew, including one Gonzales, who also had been ashore, returned to the vessel and went to the room of one of them,[7] in close proximity to that of Boudoin.[8] The three of them spent something less than the next two hours talking and drinking.[9] At 1:30 a.m., Boudoin got up for a sandwich, looked in on the three, declined their invitation to join them, returned to his nearby-room and went back to bed.[10] He left his door standing open,[11] and soon fell asleep or almost asleep.[12]

The record is devoid of evidence that the three drinking companions were at any time causing a disturbance. There is no evidence that the night mate knew of the drinking, or that the three could be heard away from the room.[13] Boudoin did not complain of any noise or disturbance, and their talking was not sufficient to keep him awake.[14]

At about 2 a.m., Gonzales left his companions and went to Boudoin's room, the door of which, as has been said, was standing open.[15] There he attempted to take one of Boudoin's bottles of liquor.[16] Boudoin, becoming aware of Gonzales's presence in the room, grabbed him,[16A] and in the

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[6]R. 91-92.
[7]R. 429-430.
[8]R. 83.
[9]R. 270, 333, 429; petitioner's appellate brief p. 1 recited that the men arrived aboard "about midnight" and that the incident took place "about 2:00 a.m."
[10]R. 78-83.
[11]R. 83.
[12]Ibid.
[13]R. 78-83, 279-280, 335, 344.
[14]Ibid.
[15]*Supra*, Note 11.
[16]R. 84.
[16A]R. 113.

effort to escape, Gonzales struck Boudoin on the head with the bottle.[17] As a result of the blow, Boudoin received injuries for which the District Court awarded him $2,100.00 in damages on the basis both of unseaworthiness and of negligence.[18] He was also awarded his maintenance, which respondent has paid in full.[19]

The brief filed by Boudoin in this court is at great pains, in a highly colored and exaggerated vein, to paint Gonzales as a person of violent and turbulent disposition. The true fact, however, is that except for this single incident Gonzales has a good record. Since 1939 he has held certificates of the United States Coast Guard as a competent seaman.[20] He has been and still is in good standing as an active member of the National Maritime Union.[21] Except for this one incident, he has never been involved in any similar misconduct during all his long service at sea.[22] At no other time has he ever assaulted a fellow crew member, ashore or afloat.[23] He remains in good standing with the Coast Guard, and except for this one instance, has never been logged or found guilty of any misconduct.[24]

Under these circumstances, the Court of Appeals for the Fifth Circuit reversed the District Court on both counts.[25] On the hypothetical unseaworthiness, the Court of Appeals held that the record does not furnish support for the con-

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17R. 84.
18R. 487.
19R. 498-499, 503.
20R. 389.
21R. 233, 400.
22R. 114, 277, 335-336, 357, 390.
23R. 390, 391.
24Ibid.
25R. 502-511.

clusion that Gonzales was a person of violent and belligerent disposition.[26] It also rejected the *Keen* case as a plain and unjustified departure from the long settled law governing responsibility for injuries intentionally inflicted by one seaman on another, and as setting up a standard of seaworthiness which is lacking in definiteness and objectivity.[27] On the second count, that of the alleged negligence, the Court of Appeals found — as it could not possibly otherwise have found on this record — that there is absolutely no substantial evidence upon which to rest a finding that the shipowner was negligent.[28]

Thus, the sole questions here presented are these:

a) Is a shipowner to be held liable in damages on the ground of supposed unseaworthiness in the case of a personal and private encounter between unlicensed seamen, wholly unconnected with the ship's business, occurring during off-hours, and where, except for this one incident, the offending seaman has an otherwise good record?

b) Is a shipowner to be held liable in damages on the ground of negligence under the *Jones Act*, where neither seaman in the encounter has any authority over the other, and where there is no evidence that the officers of the ship knew or should have known that anyone

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[26] Ibid.
[27] 507.
[28] 510.

on board was drinking or that anyone was likely to be injured as a result?

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SUMMARY OF ARGUMENT

1. *ALLEGED UNSEAWORTHINESS*

It is respondent's position that the Steamship MASON LYKES was not rendered unseaworthy by reason of Gonzales's presence aboard her as a member of her crew. The Court of Appeals correctly concluded that the shipowner's warranty of seaworthiness, as applied to fights and assaults committed on each other by unlicensed crew members, and growing out of purely personal, private affrays, is to be determined by ascertaining whether or not the offending party possessed vicious proclivities which were known or should have been known by the ship's officers. Measured by this standard of liability, it is conceded by petitioner, or virtually so, that the vessel was not unseaworthy.

It is also respondent's position that the so-called "equal disposition" test of unseaworthiness announced by *Keen* v. *Overseas Tankship Corporation* should be rejected as being unsound in law, unworkable in practice and unjustified under modern conditions of ship operation. Alternatively, however, respondent submits that the mere presence of Gonzales in the crew, even under the so-called "equal disposition" test of *Keen*, did not render the MASON LYKES unseaworthy.

2. *ALLEGED NEGLIGENCE*

The District Court's finding that the respondent was liable on the ground of negligence under the *Jones Act*, in that the officers of the ship "knew or should have known" that Gonzales and his two friends were drinking, and, because of that drinking, that the officers "knew or should have known" that someone might sustain personal injury, is not supported by any substantial evidence. The evidence in this record, insofar as it relates to the incidents on shipboard, is, except for the testimony of Boudoin, based on depositions, and was properly held by the Court of Appeals not to sustain the judgment. The record will show that respondent was in fact not negligent because:

1. The officers of the ship did not in fact know and had no reason to know that any drinking was in progress;

2. The officers of the ship did not know and in fact had no reason to know that personal injury to any member of the crew might result from the drinking;

3. In any event, petitioner's injuries were not a foreseeable consequence of the drinking;

4. A shipowner is not liable for an assault wholly unconnected with the ship's business, resulting from a purely private, personal encounter, and committed by one unlicensed crew member on another.

Accordingly, the decision of the Court of Appeals was correct and should be affirmed.

ARGUMENT

POINT I

THE S. S. MASON LYKES WAS NOT UNSEAWORTHY

THE TEST OF LIABILITY ANNOUNCED BY KEEN V. OVERSEAS TANKSHIP CORPORATION IS UNSOUND IN LAW, UNWORKABLE IN PRACTICE, AND UNJUSTIFIED.

A judicial decision cannot have aroused so many adverse critics as has *Keen v. Overseas Tankship Corporation*[29] without there being genuine justification for their criticism.[30] It flows from *Keen's* unsoundness in law, its unworkability in practice and its lack of justification under present day conditions. This can amply be demonstrated:

(a) *KEEN IS UNSOUND IN LAW*

By long and well established jurisprudence, a vessel's warranty of seaworthiness, applied to assaults committed by unlicensed crew members on each other, makes the shipowner liable only if the assailant actually possessed such vicious proclivities, based upon a prior bad record of bru-

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[29] 194 F. (2d) 515 (C. C. A. 2d 1952).

[30] 28 *St. Johns' L. Rev.* p. 87, 93 (1953); *26 Sou. Calif. L. Rev.* p. 341 (1953); 29 *Tulane L. Rev.* p. 141 (1954); see also, 30 *Texas L. Rev.* 492-501; 39 *Cornell L. Quar.* p. 381 (1954); 5 *Stan. L. Rev.* p. 814 (1952-1953).

tality, that the ship's officers knew or should have known of his dangerous disposition. In fact, prior to *Keen*, no court had gone to the length of holding a shipowner liable in an assault case involving a purely personal, private quarrel of unlicensed crew members, where the assailant did not in fact possess known vicious traits.

A brief review of the jurisprudence prior to *Keen* will be illuminating.

In *The Rolph*[31] it was held that the vessel was unseaworthy where the chief mate was a man known to be of a most brutal and inhuman nature, and to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors.

In *Kyriakos v. Goulandris*,[32] the assailant, prior to the attack in question, had shown himself to be of "savage and uncontrolled disposition" and there was evidence that the master of the ship was fully informed that he was a "quarrelsome trouble-maker", a smoker of hasheesh, that he had assaulted more than one man at least once with little or no reason, and that members of the crew had already complained of him to the master.

In *Lykes v. Grabaugh*,[33] the shipowner was not liable for what was "merely a wanton and wilful act done to satisfy the temper or spite of the employee."

In *Kable v. United States*,[34] there was a prolonged con-

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31 299 F. 52, 1924, AMC 942 (C. C. A. 9th).
32 151 F. (2d) 132, 1945 AMC 1041 (C.C.A. 2d).
33 128 F. (2d) 387, 1942 AMC 1305 (C. C. A. 5th)
34 160 F. (2d) 90, 1948 AMC 1595 (C. C. A. 2d).

troversy and several assaults in a purely personal matter, and the shipowner was not liable.

In *Yukes v. Globe Steamship Corp.*,[35] the injuries were sustained in an altercation and a scuffle constituting a mere private brawl, and there was no liability.

In *Larsen v. Lindvig et al*,[36] the shipowner was liable for an assault because it was committed under the express instructions of the vessel's master, the court relying upon *The Rolph* decision.

In the case of *Bonsalem v. Byron S. S. Co., Ltd.*[37] the shipowner was exonerated for an unprovoked assault committed by the chief steward, the court holding, under the authority of *Davis v. Green*, that the shipowner is not liable for injuries for an assault "not committed by any officer of the vessel in furtherance of the appellant's [shipowner's] business."

Based on these and other decisions the law is stated in Hughes on Admiralty:[38]

> "Intentional injuries. The better opinion is that one of the contractual duties both of the owner and master is a general duty of protecting the seaman from cruelty or ill usage. This necessarily includes liability for the personal act of the master, or the mate while acting as master. But it should

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35 107 F. (2d) 888 (C. C. A. 6th 1939).
36 292 Fed. 640 (D. Ct. Calif. 1923).
37 50 F. (2d) 114 (C. C. A. 2d 1931).
38 2nd Ed., (1920) p. 205-206.

> not impose any liability for a single act of violence by an officer out of the line of his duty, or by another seaman at all."

Finally, the latest textbook on the law of seamen, *Norris*[39] states:

> "If the assault involved constitutes a private brawl arising out of personal differences between the assailant and the victim, or between the fighters, with the assaulter not being the superior officer of the assaulted, liability will not be that of the shipowner."

Keen v. Overseas Tankship Corporation, however, disregarding these well established principles, introduced a wholly new test of seaworthiness, a test which makes the shipowner the guarantor that seamen are "equal in disposition and seamanship to the ordinary men in the calling." This standard was undoubtedly a departure from the long, well recognized and well established jurisprudence; the Court of Appeals so held in the instant case;[40] and *Keen* itself indeed admitted as much.

Petitioner concedes, or virtually so, that by the law in the absence of *Keen*, this case is not one of liability.

The question, therefore, is whether the *Keen* departure is sound in principle, and whether, under modern conditions, it is justified.

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[39]The Law of Seamen, Vol. 2 (1950), Sec. 687, p. 374.
[40]*Supra*, Note 25.

(b) *KEEN AFFORDS NO WORKABLE STANDARD OF TESTING LIABILITY*

The unworkability of the test set up by *Keen* emanates from the fact that it affronts a basic and fundamental law of human nature: that all men, especially seamen, who are drawn from all walks of life and from the various corners of the earth, and who are much "more apt to use their fists than office employees",[41] are vastly different from each other, and there is no standard except that of performance from prior misconduct, by which one can, with any degree of intelligibility, or even approximation, measure their disposition. To make the innocent shipowner the absolute guarantor of the "equal disposition" of seamen, is to make him guarantor of the equality of things which are notoriously and inherently unequal. Carried to its logically inescapable conclusion, *Keen* will make the shipowner the absolute guarantor that an individual seaman will not lose his temper in some — to him — provocative situation growing out of a personal quarrel. As the court below said, such a test is not an objective test, but is one founded only on reasoning "personal to the reasoner".[42]

The unworkability of the test set up in *Keen* is also made manifest by the decision of its own authors in the subsequent *Jones* case.[43]

In *Jones,* the authors of *Keen* appear definitely to have shrunk back from their own extreme doctrine. Oddly en-

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[41]*Jones v. Lykes Bros. S. S. Co., Inc.*, 204 F. (2d) 815, 1953 AMC 1010, 1012, (C. C. A. 2d).
[42]R. 509.
[43]*Supra,* Note 41.

ough, petitioner's brief in this court somehow gets the two cases hopelessly mixed up and exactly reversed. In *Jones*, the assault was violent, unprovoked and premeditated.[44] In *Keen*, the assault was violent, provoked, and unpremeditated.[45] The *Keen* assailant is held to be "unequal", and there is liability; the *Jones* assailant is held to be "equal" and there is no liability. Careful study of the cases will fail to show any comprehensible basis for learning why the ship in *Keen* was unseaworthy, while that in *Jones* was seaworthy. *Kelcey*,[46] which is claimed by petitioner to clarify the confusion,[47] actually does nothing of the sort.

Petitioner examines these cases and emerges with the theory that a primary question in determining seaworthiness is whether the assault was provoked;[48] that if the assault was provoked there should be no liability; but if it was unprovoked there should be liability. If anything is plain in the confusion arising from *Keen* and *Jones*, it is that provocation is not an element at all. In *Keen*, the injured party provoked the assault and recovered damages; in *Jones*, the injured party did not provoke the assault, and did not recover; and in *Kelcey*, the injured party did not provoke the attack, and did recover. Thus, there is every possible involvement of provocation and no provocation, with no consistency of result.

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[44]The court found: " . . . After the plaintiff had completed his work and returned to his quarters he was suddenly and *without provocation* beaten . . . " (emphasis ours).

[45]The court found: " . . . Keen knocked down Mruczinski with his fist . . . "

[46]*Kelcey v. Tankers Co., Inc.*, Civ. Act., Dist. Ct. Sou. Dist. N. Y., No. 60 — 122 (unpublished).

[47]petitioner's brief p. 24.

[48]Ibid.

Parenthetically, and so that *Kelcey* can be kept in its proper focus, it should be observed that the real basis of that decision was that the assailant had a bad prior record of actual conviction of assault with a dangerous weapon, and that two days before the attack the offender had actually chased Kelcey out of the galley with a knife.[49] Thus *Kelcey* was a plain case of liability under the doctrine of known or knowable misconduct. It did not need *Keen* to support it, and it does nothing whatsoever to resolve the *Keen - Jones* confusion. This very confusion vividly points up and illustrates the conjectural and speculative basis of attempting to determine the seaworthiness of a ship by the test announced in *Keen.*

* * * * * *

The suggestion is advanced that the standard of *Keen* is analogous to the general tort standard of the "average reasonable man."[50] That suggestion overlooks the fact that what we are seeking here is some reliable, predictable basis for determining whether or not a ship possesses the characteristic of seaworthiness. Seaworthiness in hull and gear can be determined with a real degree of accuracy by objective, practical and scientific tests. There is every reason why the same objectivity should be desirable as to personnel. "Seaworthiness" of personnel, however, can only be determined by prior conduct, and "unseaworthiness" can only be deduced from prior misconduct. When the standard is reduced, as it is reduced by *Keen,* to the vague, subjective

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[49] *Supra*, Note 46.
[50] petitioner's brief p. 17-18.

test of "equal disposition", the parties and the courts[51] are at a complete loss to ascertain whether a particular seaman meets that test, and no test yet devised — except that of prior conduct — could possibly forecast whether a seaman possesses the required "equal disposition", or how he might react in a private, personal altercation with a fellow seaman.

In the light of these considerations, it seems entirely plain that the *Keen* test, a purely subjective test, furnishes absolutely no reliable, consistent or workable standard for determining whether the presence of any particular seaman on board a ship renders her unseaworthy. A test so utterly lacking in definiteness, precision and objectivity is unjust, improper and unsound in law.

(c) *KEEN IS UNJUSTIFIED AND UNDESIRABLE*

In considering whether there is any need to give to the seaman a wholly new ground of recovering damages on the basis of the liability of a shipowner without fault for injuries resulting from personal affrays, it seems desirable first to assess the already ample fields of recovery which the seaman presently enjoys. They are:

1. The injured seaman has the right to be maintained and cured at the expense of his ship, regardless of fault.[52] More frequently than

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[51] R. 508; *Jones v. Lykes Bros. S. S. Co., Inc.*, 1953 AMC 703 (Dist. Ct. Sou. Dist. N. Y.); rev. on appeal, *supra* note 41.

[52] *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903); Robinson on Admiralty (1930) p. 291.

not, this important right alone exceeds by far the maximum monetary recovery allowed shoreside workers under Workmen's Compensation Statutes;[53] e.g., in *Jones vs. Lykes Bros. S. S. Co., Inc.*,[54] in which recovery for damages was denied, the seaman actually recovered, in maintenance, over $11,500.00.[55] The daily maintenance rate under present union contracts is $8.00 per day, or $240.00 a month.[56]

2. The injured seaman, regardless of fault, recovers wages to the end of the voyage.[57]

3. In addition to maintenance, cure and wages, and independently thereof, the seaman injured by the unseaworthiness of his ship (i.e., in the case of assault, by an assailant of brutal characteristics which are known or knowable) is entitled to compensatory damages.[58]

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[53]Vol. 30 *Tex. L. Rev.* 492 (1952): "The seaman, . . . is not forced to choose between compensation and indemnity . . . Statute and tradition combine to provide explicitly a double remedy. His right to maintenance and cure plus full wages is analagous to compensation, *although much more liberal*, while the right to indemnity is not alternative, but in addition to maintenance and cure . . . The cost of such a double recovery is a heavy burden for the Defendants to bear . . . " (emphasis ours).

[54]*Supra*, Note 41.

[55]Ibid; See also District Court Record, Civ. Action 60-122, Sou. Dist. N. Y.; *Joseph H. Lewark v. Marine Transport Lines, Inc.*, Civ. Action No. 42-103 (U. S. District Ct. Sou. Dist. N. Y.) ($10,000.00 awarded in maintenance); *Rose Fontmorin v. U. S. Lines Co.*, Civ. Act., Sou. Dist. N. Y. ($10,000.00 maintenance judgment).

[56]Contracts between unions and companies; see also R. 498.

[57]*Supra*, Note 52.

[58]*Supra*, Notes 31-39.

4. Also, in addition to maintenance, cure and wages, the seaman injured by the negligence of the shipowner or of his fellow seaman is entitled, under the *Jones Act*,[59] to compensatory damages.

In no other industry is the worker so favored.[60] The addition to these rights by further projection and extension of the field of liability without fault, to include damages in the case of private, personal encounters between men who have given no prior indication of misconduct or of bad disposition, is unnecessary, and is uncalled for by any consideration of justice or humanity.[61]

It seems too plain to require elaboration that *Keen* invites a flood of litigation involving seamen's affrays. It invites every seaman who loses a fight, indeed, every seaman who suffers injury in any kind of personal altercation, ashore or afloat, to seek to charge the shipowner in damages because his opponent was "unequal in disposition" to the "average" seaman. There actually has already begun a spate of litigation involving brawls and fights, even those occurring in bar-rooms ashore, in which liability is being sought to be predicated upon *Keen*. *Keen* encourages such suits; and certainly, taken at its face value, there is nothing in *Keen* to inhibit them.

It is not argued that this one case, by itself, could radically change the industry. It is submitted, however, that the sharply increasing costs to which the shipowner is put

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[59] 46 U.S.C.A. 688.
[60] *Supra*, Note 53.
[61] *Supra*, Note 30.

by these widening liabilities, to which *Keen* substantially adds, are properly becoming more and more a matter of concern to the American shipping industry. The steady extension of liability for incidents over which the shipowner, in the very nature of things, can have no possible control and can take no effective preventive measures, represents a definitely important element in the disadvantageous position in which American shipping is now being placed in its competition with foreign shipping.[62] It may very well have its proportionate weight in the decision of whether to transfer operations to foreign flags.[63] The extension of the shipowner's liability herein sought should not, in the absence of some genuinely controlling reason, be allowed to contribute to such a result; and no controlling reason suggests itself in this case.

These considerations seem also effectively to dispose of petitioner's resort to the well-worn suggestion that the lack of *stare decisis* should not hinder the "progress of the law",[64] and to his invoking of the doctrine of the "wardship" of the admiralty over seamen.[65] Certainly, the extension of the shipowner's liability in damages to the absolute warranty of the "equal disposition" of seamen, fomenting, as beyond doubt it has already fomented, litigation involving every type of seaman's personal altercation, cannot fairly or legitimately be labeled "progress".

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[62] *Supra*, Note 56; *see also* The so-called "50-50 Law", Public Law 664, 83rd Cong., 2d Sess.; ibid; Industrial Relations in Ocean Shipping Industry, Report of Industrial Relations Counselors, Inc. to Maritime Industry Survey Committee (1953); Study by Industrial Relations Counselors, Inc. (1953).

[63] Ibid; Research report No. 54-17, American Merchant Marine Institute, Inc., Dec. 13, 1954.

[64] petitioner's brief p. 16.

[65] Ibid p. 19-20.

So, too, petitioner's reference to "wardship".[66] Seamen, injured in fights, brawls, or assaults, when not themselves guilty of gross misconduct, are entitled, under the benevolent doctrine of maintenance and cure, to receive, at the expense of the shipowner, full maintenance, along with cure (medical care) until they have reached fullest possible recovery.[67] There is no legitimate ground for using the "wardship" doctrine as an excuse for imposing upon the industry a wholly new area of liability in damages without fault. This seems particularly true when it is remembered that the low social and economic status of the seaman, which originally gave rise to the "wardship" idea,[68] no longer exists.[69] The advance in the seaman's social and economic status forms one of the most interesting success stories in modern labor - management relations. In 1939, the AB seaman's average earnings were only $82.00 a month; today they are over $525.00 a month, without regard to all the other and numerous "fringe" benefits attached to his contract.[70] Today, the seaman's effective measure of security is derived not only from the wide and benevolent protection which the law has thrown around him, but also from the strength of his union, in which he participates, which he helps to operate, and which has now assumed a good part of the day-to-day protective role which formerly only the courts could provide.[71]

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[66] *Supra*, Note 65.
[67] *Supra*, Note 52.
[68] *Harden v. Gordon*, Fed. Cas. 6047 (C. C. Me. 1823); *The David Pratt*, Fed. Cas. 3597 (D. Ct. Me. 1839); *Hume v. Moore — Mc Cormack Lines*, 121 F. (2d) 336 (C. C. A. 2d 1941).
[69] *Supra*, Notes 53, 56, 62.
[70] See report and survey *supra*, Note 62.
[71] Ibid.

Accordingly, *Keen,* under present day conditions, is undesirable and unjustified, and the Court of Appeals rejection of it should be affirmed.

POINT II

THE PRESENT TEST OF PRIOR MISCONDUCT BY THE OFFENDING SEAMAN IS SOUND IN LAW.

While the warranty of seaworthiness, in nature and quality, is absolute, and is a species of liability without fault,[72] it has never been held to apply in cases of fight and private quarrels of unlicensed seamen to the same extent as in cases of defects in hull and gear.[73] There are compelling reasons for the distinction.

As the court well knows, in modern operations, the shipowner, is compelled to obtain all seagoing personnel through union halls.[74] The unions do not permit the rejection of their members in good standing unless the shipowner can make a clear showing that the rejected seaman has, by prior misconduct, demonstrated his incompetency or disqualification.[75] To hold that the shipowner guarantees what he cannot reject, is to force him to guarantee what he is forced to take, ignores the practical realities of life, and does not appeal to any sense of fundamental fairness or justice.

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[72]petitioner's brief p. 14.
[73]*Supra*, Notes 31-39.
[74]Ocean Transportation, Carl E. Mc Dowell and Helen M. Gibbs (New York 1954) p. 211; supra Note 56.
[75]Ibid: R. 135-136.

Furthermore, while the warranty is a species of liability without fault,[76] it is certainly not a species of liability without defect. It is clear that, in order that liability attach for unseaworthiness, there must in fact exist a defect actually amounting to unseaworthiness, a genuine defect and not one merely temporary or transient.[77] Defects of such a kind exist in every example cited in petitioner's discussion of the nature and extent of the warranty as it applies to hull and gear.[78]

To lay down prior misconduct as the test of "unseaworthiness" in fight and assault cases is to apply correctly and logically those same principles to the case of personnel. As with the ship's appurtenances, there must exist a real defect in order to constitute unseaworthiness, a defect of sufficient duration to justify declaring the seaman "unseaworthy";[79] and, if he has not by prior conduct in fact displayed some degree of vicious tendencies, he certainly cannot be branded as "unseaworthy", that is, as unfit to sail.[80]

Thus, the present legal test of determining liability by the prior conduct of the offending party, affords a sound legal basis of ascertaining genuine seaworthiness or lack

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[76]petitioner's brief p. 14.

[77]*Cookingham v. United States*, 184 F. (2d) 213 (C. C. A. 3d 1950); cert. den. 340 U. S. 935, 71 S. Ct. 475; *Adamowski v. Gulf Steel Corp.*, 197 F. (2d) 523 (C. C. A. 3d 1952); cert. den. 96 L. Ed. 1324; *Garrison v. United States*, 121 F. Supp. 617 (D. C. Col. 1954); *Daniels v. Pacific-Atlantic S. S. Co.*, 120 F. Supp. 96 (D. Ct. N. Y. 1954); *Balado v. Lykes Bros. S. S. Co., Inc.*, 179 F. (2d) 943 (C. C. A. 2d 1950).

[78]petitioner's brief p. 14-15.

[79]*Supra*, Note 77.

[80]*Jones v. Lykes Bros. S. S. Co., Inc., supra* Note 41. The court stated: " We are not satisfied that the finding proved that Hunter was a man unfit to serve . . . "

of it, and is a standard or test which should not be disturbed.

POINT III.

THE PRESENCE OF THE OFFENDING SEAMAN, GONZALES, ABOARD THE SS MASON LYKES DID NOT RENDER HER UNSEAWORTHY.

The District Court did not know of the *Jones* decision when it decided the present case.[81] It is fair to assume, as the Court of Appeals assumed,[82] that the District Court would not have thought that this was a case for the application of the "equal in disposition" standard if it had known that the Second Circuit, the creators of the standard, would themselves refuse to apply it in favor of the victim in the *Jones* case.

A fair reading of the record will disclose that it contains no substantial evidence to support the application of the *Keen* standard.

It is regretable that it becomes necessary in this court to correct petitioner's numerous erroneous statements of fact. The court, itself examining the record, will readily see that petitioner's assertion of Gonzales's "general reputation for belligerence"[83] is without support in the evi-

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[81]R. 479; The District Court here rendered judgment on May 15, 1953; *Jones v. Lykes Bros. S. S. Co., Inc., supra* Note 41, judgment rendered June 4, 1953.

[82]R. 509-510.

[83]petitioner's brief p. 10, 28.

dence. The only such purported testimony was that of Boudoin, himself, and it shows plainly that he did not have any knowledge at all of Gonzales's "general reputation."[84]

The accusation that Gonzales, after Boudoin's injury, obtained a knife,[85] will be seen by checking petitioner's footnote references, to be derived entirely from certain unsworn statements attached to the log book, specifically excluded by the trial judge, not once, but several times,[86] and petitioner did not appeal from these rulings.[87] These un-

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[84]R. 89 where the record reads:

"BY THE COURT:

". . . Let's be more specific than that. Let the plaintiff say whether or not he heard the reputation of Gonzales discussed, and then get the particular *incidents* on board the ship which possibly should have been known to the other members of the crew.

"QUESTION: You understand what I mean by the man's reputation?

"ANSWER: You mean his conduct.

"THE COURT: What other people think about him?

"ANSWER: What other people think about him?

"QUESTION: Yes, think about him.

"ANSWER: Well, what other people think about him, that is pretty hard to say, Your Honor."

In other words, this testimony clearly shows that petitioner did not and could not testify concerning Gonzales's "general reputation", and that his testimony was limited to his own opinion.

[85]petitioner's brief, p. 10.

[86]R. 56, 58, 62, 69, 72, 240-243; the court stated at p. 243:

"Let's make it *crystal clear*. The log is admitted in evidence. The statements, except the two statements, are *excluded*." (Emphasis ours); the two statements referred to by the court are the statements of the master and chief officer. The excluded statements were rightfully excluded; see *Palmer v. Hoffman*, 318 U. S. 109, 65 S. Ct. 477, 87 L. Ed. 645 (1943); *Chapman et ux v. United States*, 194 F. (2d) 974 (C. C. A. 5th 1952); *New York Life Insurance Co. v. Taylor*, 147 F. (2d) 297 (C. C. A. Dist. of Col. 1944); *Naylor v. Isthmian S. S. Co.*, 189 F. (2d) 538 (C. C. A. 2d 1951). However, the issue of admissibility is not before the court as petitioner did not appeal the ruling excluding the statements and it was not raised in the application for certiorari.

[87]R. 498.

sworn statements of witnesses who did not appear in the case,[88] are not part of the application for the writ;[89] no error was assigned against their obviously correct exclusion;[90] and petitioner's reference to them, and his confection of whole arguments upon them, constitute a gratuitous excursion from the record, an excursion which can properly be ignored.

A reading of the evidence will also disclose to the court that, except for the incidents of the present case, Gonzales has a good record. We have already adverted at length to that good record[90A] and it is not necessary to repeat it here. Suffice to say that the record of Gonzales, after years of service with the Merchant Marine,[90B] was free of any misconduct involving assaults or attacks;[91] and that he still remains in complete good standing with the Coast Guard,[92] and with his and Boudoin's union.[93] There is nothing in his record to justify the finding of fact that he was not of "equal disposition" with the "average" seaman. Even under the standard of *Keen*, his "disposition" was "equal" and nothing would have required a reasonable shipowner, with

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[88]These unsworn, excluded statements are not only attached to the log book, but were read into the record during the course of several depositions.

[89]petitioner's application and brief for certiorari.

[90]*Supra*, Note 87.

[90A]*Supra*, Notes 20-24.

[90B]*Supra*, Note 20.

[91]*Supra*, Note 22, 23.

[92]*Supra*, Note 24.

[93]*Supra*, Note 21; Petitioner, however, was expelled from the union (National Maritime Union) (See R. 111) after leaving the Mason Lykes. This undoubtedly resulted from his activities aboard the ship (See R. 111) and his excessive drinking. (R. 49-54, 108-110).

full knowledge of his background, to reject him as being "unseaworthy", that is, unfit to sail. The court well knows that many thoroughly competent and excellently qualified seamen have displayed at least one period of misconduct from drinking. A single set of such circumstances does not, in the words of the Second Circuit in the *Jones* case, establish Gonzales as a "man unfit to serve, judged by the usual standards of the calling".[94] Certainly, nothing which Gonzales did in this case — even viewed in its most unfavorable light — justifies his forever being deprived of his livelihood as a seaman; but that harsh result will follow as a matter of course if the District Court is held to have been right, and if his mere presence aboard a vessel will render her unseaworthy.

It is submitted that the MASON LYKES, even by the *Keen* standard, was not unseaworthy because of having Gonzales in the crew, and, even accepting that standard, the case, on its facts, is not one of liability.

POINT IV

THE SS MASON LYKES WAS NOT NEGLIGENT

(A) THE FACTS

In addition to the theory of unseaworthiness, the District Court held the shipowner liable in damages on a theory of the supposedly negligent violation of the duty of the ship's officers to suppress disorderly acts of seamen which might reasonably be expected to result in injury to other

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[94] *Supra*, Note 80.

members of the crew.[95] Generally speaking, this principle of law is sound, but the Court of Appeals correctly concluded that it has no application to the facts of this case, since the record discloses that there is no substantial evidence upon which to support such a finding.[96]

Petitioner attempts to develop by repetition the contention that the three men were "boisterous", that they "could have been heard in the messhall . . . and passageway", and that their drinking should have been suppressed by the night mate, who is said to have "frequently inspected" the crew's quarters.[97]

There is no evidence that the night mate or any other officer had any knowledge of the drinking. The District Court, knowing that there was no evidence of actual knowledge, concluded that the officers "knew or should have known" that drinking was taking place, and therefore should have taken steps to suppress it.[98]

Reduced to its fundamentals, the only testimony purporting to sustain this theory was Boudoin's own testimony that the three men were loud and noisy;[99] but that this alleged disturbance did not in fact exist is actually shown by Boudoin's own testimony. Boudoin admitted that he "wouldn't say" that the "noise carried through the vessel"; that "if you were on the opposite side of the mess hall", which was located just two or three feet across the passageway from

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[95]R. 487.
[96]R. 510-511.
[97]petitioner's brief p. 9, 10, 28, 34.
[98]*Supra*, Note 95.
[99]R. 78-80.

the room where the drinking was taking place,[99A] you couldn't tell whether the noise was "cargo winches or the noises in the ship, or natives ashore on the dock or what it was."[100] This testimony from Boudoin himself establishes that the night mate on duty, required to make only one routine inspection in the two hours or less during which the men were drinking,[101] would have hardly been likely to hear them. This one routine inspection by the night mate at 1 o'clock did not involve his entering the rooms of the seamen. The custom of the sea prohibited his so doing.[102] Furthermore, Boudoin's testimony is limited to the one short period when he passed by the room in question.[103]

Also absent from the record is any testimony so much as suggesting that the officers or any members of the crew were disturbed by the three men. In fact, Boudoin, up at 1:30 a.m. to get a sandwich, went on back to bed and to sleep, leaving open the door of his room, only a short distance from the room where the drinking was taking place.[104] Later, when Gonzales entered Boudoin's room, through the still open door, Boudoin was asleep or almost asleep, and himself had not been kept awake by the alleged "loud and boisterous" noise.[105] No one — not even Boudoin — ever complained of having been disturbed by that "loud and boisterous" noise, for not suppressing which the officers are now claimed to have been at fault.

99A R. 78-79.
100 R. 82-83.
101 R. 81 where petitioner stated: "The officer on watch in port is supposed to make his rounds *once an hour*, check the cargo hatches and everything."
102 petitioner's brief p. 32; R. 439.
103 *Supra*, Note 100.
104 *Supra*, Notes 11, 12.
105 Ibid.

The argument of counsel, however deftly, attractively or vigorously urged, cannot supply the deficiencies of evidence, nor create evidence which does not exist, nor alter the plain facts of the case. Thus, petitioner, grasping for evidence which does not exist, charges that the gangway watchman, in not reporting Gonzales and his companions to the night mate when they returned to the ship, failed in his duty to report the presence of "badly intoxicated" seamen.[106] This charge is wholly answered by the complete lack of evidence that the three men were intoxicated when they returned at midnight. So, too, the attacks made by the petitioner on the master and the chief officer are efforts to plant fault where none exists. The charge that the master had not ordered the gangway watchman to report the presence of intoxicated seamen aboard the ship[107] is disproved by the fact, which the record establishes without contradiction, that it was the "routine duty" of the watchman so to do.[108] The attack upon the chief officer is likewise unfounded; at no time did he "knowingly permit" consumption of liquor aboard the ship;[109] he himself had no liquor aboard the ship on the voyage in question;[110] and there is no evidence that at any time had he consumed liquor aboard the ship.[111]

We should suppose, of course, that even petitioner would concede that a person is not to be held negligent when he has performed all that is humanly and reasonably re-

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[106]petitioner's brief p. 34.
[107]Ibid 34, 35.
[108]R. 324.
[109]R. 383.
[110]R. 383-384.
[111]Ibid.

quired of him. The record will show, by Boudoin's own repeated statements,[112] that respondent promulgated rules against shipboard drinking and at all times, to the extent that it is humanly possible so to do, has sought to prevent the consumption of liquor aboard ship.[113] Petitioner has been unable to point to a single instance when shipboard drinking, known to the vessel's officers, was allowed to continue. The prompt and forceful way in which Captain Townsend and Chief Officer Staggers confiscated Gonzales's liquor and threw it overboard;[114] the way in which Captain Townsend disciplined Gonzales,[115] logged him for his misconduct, [116] and discharged him at the end of the voyage,[117] despite the efforts of his shipmates to have him remain in the crew of the vessel;[118] all of this shows the true attitude of respondent and of the ship's officers to shipboard drinking and fighting.[118A] The assertion of petitioner that respondent is "lax" and "indifferent"[119] to shipboard drinking and fighting is thus seen to be a mere fic-

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[112]petitioner's brief 12, 27, 30.

[113]R. 147, 383.

[114]R. 271-272.

[115]R. 272, 337-338, 351.

[116]R. 273.

[117]R. 274.

[118]Ibid; 339.

[118A]R. 324.

[119]petitioner's brief 35.

tion, unsubstantiated by any shred of evidence in this case.[120]

Thus, it is abundantly clear that the record does not support the District Court's finding that the officers had constructive knowledge that the three men were drinking in the forecastle, or that the men were guilty of disorderly acts likely to result in personal injury; and the Court of Appeals correctly so concluded.

(B) *THE LAW*

There is no basis for the finding that the ship's officers knew or should have known the men were drinking on board the ship, or for the trial judge's equally erroneous

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[120]R. 507. Petitioner, in addition to the unfounded assertions against the ship's officers, attacks respondent's claims representative, vice president, and assistant manager of the marine division. (See petitioner's brief, pps. 35-36). What relevancy this may have to a cause of action predicated upon negligence under the Jones Act is difficult to see. Moreover, petitioner's assertions are unfounded: (1) Mr. Beyer, a claims representative, *who was called during the trial by petitioner's service of a subpoena duces tecum* (R. 246) is charged with not having an "index card" on the misconduct of Gonzales. As a claims representative, Mr. Beyer would maintain cards *only* under the names of seamen who sustain injuries and thus would have potential claims. His diligence is demonstrated by his having a card on a very minor injury Gonzales sustained. (R. 250) (2) The charge against Mr. Biggers is likewise unfounded. He too *was called by petitioner during the course of the trial.* (R. 206) He is attacked by isolating his answer to a hypothetical question to the effect that he would employ a sailor who had a fight. A full reading of his testimony will show that he did not consider a sailor who had a fight automatically barred from the sea, particularly when the loser made no complaint. (3) The attack on Vice President Jimison is grounded solely in the reemployment of Gonzales some time after his dismissal from the MASON LYKES. But before the hiring hall sent Gonzales back to Lykes, the Union investigated the Boudoin case, disciplined and dismissed, not Gonzales but Boudoin, and retained Gonzales in good standing. (R. 211, 212, 213).

finding that the officers should have anticipated that the drinking "might lead to an assault by one seaman on another",[121] — a finding beyond the scope of the elementary rules of proximate cause.[120A] The facts here disclose that this was not an ordinary drunken fight, nor the consummation of a long and loud dispute, but was the result of the unforseen and wholly unforeseeable actions of Gonzales. Viewed most favorably to petitioner, it was neither natural nor probable that the drinking and talking of Gonzales and his companions would lead to one of them leaving the room, going to Boudoin's room, attempting to obtain his bottle, and then, when grabbed by him, in the ensuing tussle striking him with the bottle. The injury to Boudoin in those circumstances is entirely beyond the realm of forseeability, and cannot be said to have been a natural and probable consequence of the mere fact of several men sitting about in a seaman's forecastle engaged in drinks and tall tales.

When men are repeatedly violent and belligerent, as in the *Koehler* case, [122] or make extensive preparations for a fistic encounter, as in the *Jensen* case, [123] or are unrestrained because the ship's officers repeatedly condone fighting and disorderly conduct of which they have full

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120AIt is too well established to require further comment that the basis of an action under the *Jones Act* is negligence, and, to recover, the seaman must allege and prove that the defendant was negligent (See 46 U.S.C.A. 688; *Pittsburgh v. Palo*, 64 F. (2d) 198 (C. C. A. (6th) 1933); and it is equally well established that the negligence complained of must be the *proximate* cause of the injury. See *Brady v. Southern Railway Company*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239; *Reynolds v. Atlantic Coast Line R. Co.*, 196 F. (2d) 643 (C. C. A. (5th) 1952).

121R. 487.

122*Koehler v. Presque-Isle Transportation Co.*, 141 F. (2d) 490, 1944 AMC 432 (CCA 2d).

123*Jensen v. United States* 184 F. (2) 72, 1950 AMC 1797 (CCA 3d).

knowledge, as in *Stankiewicz* case, [124] there is possibly some justification for the conclusion that their actions might "reasonably be expected to result in injury to others." But men engaged in drinking in a friendly gathering, unaccompanied by violence or boisterousness, as here[125], are not performing such open and obvious acts as to call to themselves the attention of the ship's officers. Thus the Court of Appeals correctly concluded that none of the officers knew, and none should have anticipated, that the drinking incident would lead to personal injury.[126] There is nothing unusual about the friendly gathering of seamen in one another's forecastles, and such a gathering would not of

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[124] *Stankiewicz v. United Fruit S S Corp., et al,* 123 F. Supp. 714 (Dist. Ct. N. Y. 1954) In the *Koehler* case there was evidence of (1) *prior* misconduct by the assailant which was *known* to the vessel's officers (the Second Officer saw the assailant "pick" a fight and "beat up" a fellow seaman); (2) The Third Officer *saw* the assailant yelling and swearing at the plaintiff; (3) the plaintiff *told* the Second Officer, *prior* to the assault in question, that the assailant *had attacked him;* and finally (4) there was evidence that indicated the officers *knew* the assailant was "waiting for" the plaintiff, to attack him. In the *Jensen* case the evidence established (1) that one of the ship's officers *told* the assailant to refrain from fighting a fellow crew member until both men returned to the vessel; (2) that it was the *custom* on the vessel to permit crew members *to fight*, the officers condoning the improvising of a hatch cover as a fighting area; (3) that the condoned custom was observed in the involved incident,the ship's officers *acting as anxious boxing spectators,* and the vessel's floodlights illuminating the improvised arena. The plaintiff was injured as he attempted to prevent the assailant from using a knife on his boxing opponent. In the *Stankiewicz* case, the evidence regarding the assailant indicated that on *several occasions* he boarded the vessel intoxicated, *engaged in fights which were actually observed by the ship's officers,* and that the assailant, on the date in question, was drinkin on board the ship. The court merely held that these facts created a question for trial on the merits. It is obvious that these three decisions have absolutely no bearing whatsoever upon the instant problem.

[125] *Supra,* p. 26-27.

[126] R. 510-511.

itself lead one to anticipate that personal injury, particularly to a person outside the group, might result.

McAllister v. United States of America[127] has no application to the instant case. The test of that case for the correctness of the District Court's findings, applied to those here, shows that they were "clearly erroneous." That question, properly presented to the District Court in our case, was properly passed upon by the Court of Appeals, and the findings of the District Court were properly reversed. In *McAllister* there was sufficient evidence to support the District Court's finding of negligence; here, the record does not support those findings. Indeed, an examination of our record reveals that the District Court predicated a good part of its findings solely on certain unsworn statements which the District Court itself had correctly excluded.[128] Furthermore, *McAllister* is not pertinent because, with the exception of Boudoin's own testimony, all the factual evidence in our case concerning what occurred aboard the vessel was introduced by deposition. It is well settled that the presumption in favor of the District Court's findings is not so strong where the case is tried on depositions, since the Court of Appeals is as able to weigh deposition evidence as is the District Court.[129] The point here, however, is not one of weight of evidence, but of the total lack of any substantial evidence to sustain judgment in favor of Boudoin.

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[127] 99 L. Ed. 13 (1954).
[128] *Supra*, Note 86.
[129] *Carter Oil Co. v. McQuigg*, 112 F. (2d) 275 (C. C. A. 7th 1940); *Pacific Portland Cement Co. v. Food Mach. and Chem. Corp.*, 178 F. (2d) 541 (C. C. A. 9th 1949); *Fleming v. Palmer*, 123 F. (2d) 749 (C. C. A. 1st 1941), cert. den. 316 U. S. 662, 62 S. Ct. 942, 86 L. Ed. 1739 (1942).

That was the basis, and, we submit, the proper basis, of the Court of Appeals' reversal on this phase of the case.

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The assumption of petitioner that the shipowner's duty to furnish a safe place to work forms any basis of liability under the facts of this case[130] is a false assumption predicated upon the false theory that such a duty exists independently of negligence or of unseaworthiness. It is well established that in order to permit recovery for breach of the obligation of a safe place to work there must be an affirmative showing that the shipowner was negligent or that the ship was unseaworthy.[131]

Petitioner's concluding argument[132] apparently is that the mere assault by Gonzales, in and of itself and with nothing more, is an act of negligence under the *Jones Act*. This is a palpable afterthought, not urged in the District Court,[133] not part of the District Court's findings,[134] not urged to nor considered by the Court of Appeals,[135] and not a question tendered here by the application for the writ.[136] Aside from this, however, this unsound theory is disposed of by the many decisions holding that a shipowner is not liable under the *Jones Act* for fights, altercations, or other disturbances among unlicensed personnel when such mat-

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130 petitioner's brief, p. 32.
131 *Rouchleau v. Silva*, 1950 AMC, 673; *Biles v. United States*, 1949 AMC 875; *Vojkovich v. Ursich*, 121 P. (2d) 803, 49 Cal. App. (2d) 268 (1942).
132 Petitioner's Brief p. 37.
133 R. 498.
134 R. 486-487.
135 Ibid; See also R. 502-511.
136 Petition and Brief for Certiorari.

ters are unrelated to the ship's business.[137] The basis for this rule, so fundamental in all laws governing employer-employee relationship, is that an employer does not hire one employee to assault another, and can only be liable when the assault is committed by one having authority over the other and then only when he is in the furtherance of the employer's business.[138] The case of *Steely v. Kern*[139] put forward by petitioner as purported authority for abolishing these basic standards of liability had no such scope or effect. That case, which did not involve an assault or similar altercation, is authority only for the proposition that the intent to do harm may, under certain circumstances, amount to negligence under the Federal Employers' Liability Act. That was exactly what the court held in *Jamison v. Encarnacion*,[140] the well known authority for the proposition that intentional torts, committed in the line of duty, and not those involving mere personal engagements, are actionable negligence under the *Jones Act*. In our case the actions of Gonzales, viewed in the light most favorable to petitioner, cannot by any stretch be said to have been committed in the line of duty or in the furtherance of the employer's business.

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[137] *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299 (1922); *Jamison v. Encarnacion*, 281 U. S. 635, 1930 AMC 1129; *Cain v. Alpha S. S. Co.*, 281 U. S. 642, 1930 AMC 1133; *Buralis v. United States*, 79 F. Supp. 963 (Dist. Ct. N. Y. 1948) the court holding that an assistant engineer is *not* acting in furtherance of the employer's business in assaulting another officer; *Nowery v. Smith et al*, 69 F. Supp. 755 (Dist. Ct. Penn. 1946) where the injuries resulted from a fist fight with the Chief Engineer, the court held that the Chief Engineer was *not* acting as an officer of the ship and therefore the assault was *not* committed while he was acting *within the scope of his employment*; See also *Kable v. United States*, *supra*, Note 2.

[138] Ibid

[139] 313 U. S. 545 (1941).

[140] *Supra*, Note 137.

CONCLUSION

It is submitted that under the principles of the general maritime law the mere presence of Gonzales aboard the vessel did not render her "unseaworthy"; that what Gonzales did, viewed even most favorably for petitioner, does not justify branding either his ship or him "unseaworthy", with consequent deprivation of his means of livelihood. The benevolent provisions of the maritime law already afford ample bases of seamen's damages. Extension of the shipowner's liability without fault into the wholly new area of permitting recovery in a purely personal encounter, unrelated to the ship's business, is not required by any social, economic or legal consideration. Finally, as to the allegations of negligence, they are without any substantial factual support and cannot sustain judgment against respondent under the *Jones Act*.

Accordingly, it is submitted that the decision of the Court of Appeals was correct and should be affirmed.

Respectfully,

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CERTIFICATE

I, Joseph M. Rault, counsel for respondent, Lykes Bros. Steamship Co., Inc., and a member of the bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1955, I served copies of the foregoing brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes.

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Jos. M. Rault